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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1044

PAULINE JUNE FORSYTHE,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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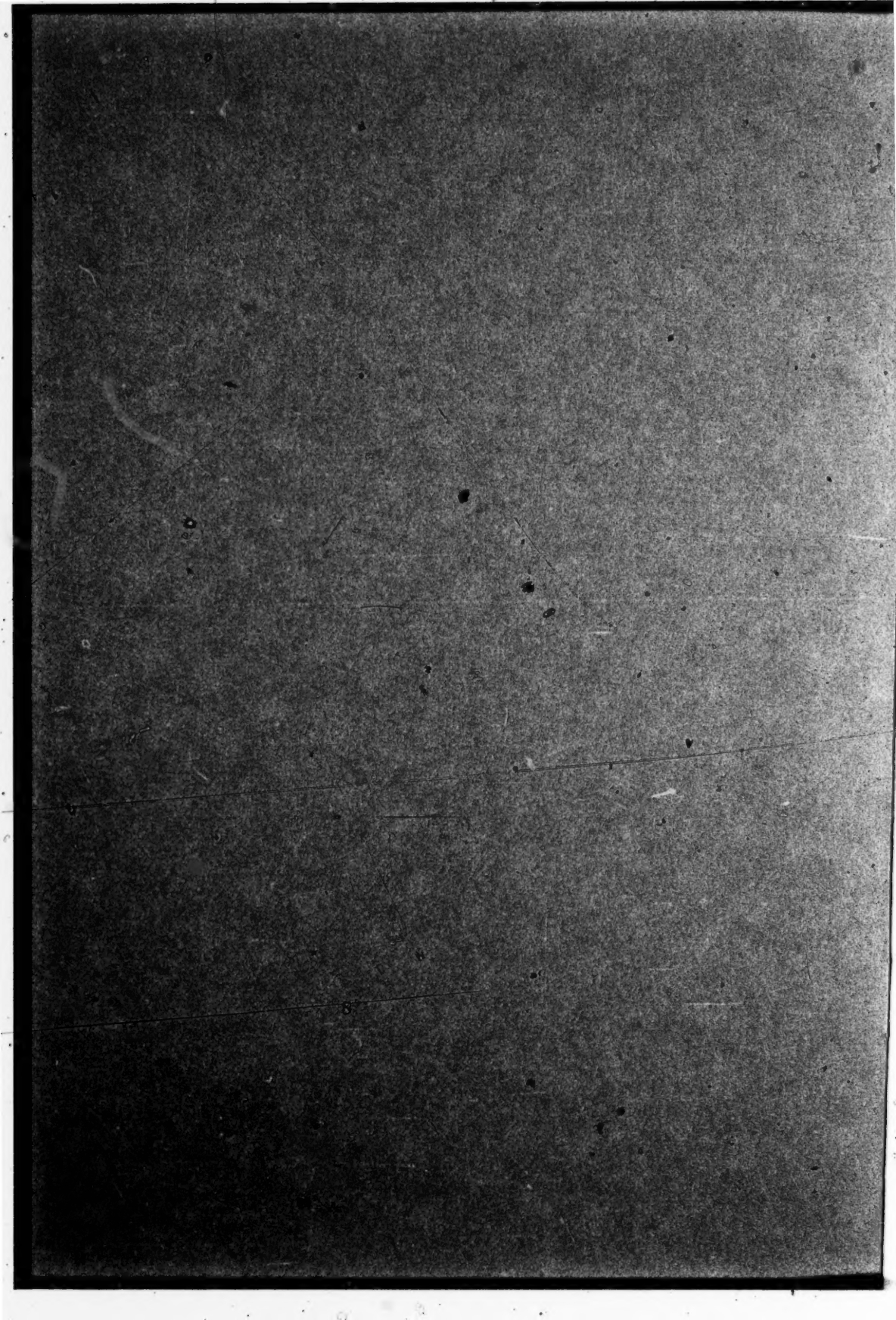

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

PAULINE JUNE FORSYTHE,

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vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI To the Supreme Court of Ohio.

Petitioner herein, Pauline June Forsythe, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in this matter on October 25, 1967.

OPINIONS BELOW.

Neither the Court of Appeals for the Third Appellate District of Ohio (Allen County) nor the Supreme Court of Ohio issued an opinion in this case.

STATEMENT OF JURISDICTION.

On October 25, 1967, the Supreme Court of Ohio denied Petitioner's motion for a re-hearing of its decision made September 27, 1967, overruling Petitioner's motion for leave to appeal.

On November 10, 1967, this Court by Mr. Justice Potter Stewart issued an order staying issuance of the mandate of the Supreme Court of Ohio pending the timely filing of a petition for a writ of certiorari in this case.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3), and Part V, Rule 19 (1) (a) of this Court's rules, inasmuch as the Ohio courts have denied Petitioner rights, privileges and immunities guaranteed her under the Constitution of the United States.

QUESTIONS PRESENTED.

I.

Whether a state procedural rule that a defendant waives her privilege against the use of illegally seized evidence if she does not move to suppress said evidence prior to her trial can operate to deny her of her Constitutional safeguards against the use of illegally-seized evidence in a situation where the knowledge that the evidence was illegally seized was not available to the defendant until after her trial commenced?

II.

Whether a woman alone in her home except for seven police officers who have accused her of a crime and are questioning her while searching her home, has been deprived of her freedom in a significant way so as to bring her within the procedural safeguards of the Constitution of the United States as to statements obtained from her by the officers?

III.

Whether the procedural safeguards of the Constitution of the United States extend to protect a defendant who has declined to testify at her trial against remarks by the prosecutor to the jury about defendant's failure to call any witnesses to her defense?

CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional provisions involved are: That portion of the Fourth Amendment that reads:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated * * *."

That portion of the Fifth Amendment that reads:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

That portion of the Sixth Amendment that reads:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

And that portion of the 14th Amendment that reads:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT OF THE CASE.

This Petition for a writ of certiorari to the Supreme Court of Ohio is brought because of the failure of the State of Ohio to accord the Petitioner, Mrs. Pauline June Forsythe, rights and privileges guaranteed to her by the Constitution of the United States during her arrest, trial by jury and conviction for the crime of concealing stolen property.

The Petitioner, Mrs. Forsythe, was alone in her home at 224 E. McKibben Street in Lima, Ohio, the night of February 21, 1966 when six police officers armed with an

illegal search warrant entered the home and, after accusing her of concealing stolen property, conducted a vigorous and ransacking nighttime search of her home.

In conjunction with the search, the officers, without warning Mrs. Forsythe of her privilege against self-incrimination and her right to counsel, interrogated the distraught woman vigorously and at length, obtaining from her a number of exculpatory statements later used by the State at her trial in an effort to show guilty knowledge, a prime element of the crime of which she was accused.

This case arose from the January 22, 1966, burglary of a suburban Lima, Ohio, home during which a number of valuables, including a mink coat and two fur-trimmed sweaters, allegedly were stolen. Allen County Sheriff's Deputy John Winters, who led the February 21 search of Petitioner's home, conducted the investigation of this burglary.

Early in the afternoon of February 20, a day and a half prior to the search, Deputy Winters obtained information accusing the Petitioner of concealing in her home "a mink coat, mink stole and jewelry." The following evening, at 6:30 p.m. on the 21st of February, Deputy Winters went to the home of Lima Municipal Judge Roger Andrews and, on his affidavit that Mrs. Forsythe was committing the offense of concealing stolen property, obtained a warrant to conduct a night-time search on the grounds of its "urgent necessity."

Arriving at Petitioner's home at 8:15 p.m. that night, Deputy Winters and the five (5) other officers first read to her the search warrant which accused her of concealing the mink coat and other items. Then, without first advising her of her privilege against self-incrimination and her right to counsel, the officers proceeded to question her

and even threatened to damage her property by breaking down locked doors if she refused to yield up the stolen property. During this initial confrontation, the Petitioner is alleged to have made an exculpatory statement to the effect she "had no fur coats."

The officers then proceeded to search the house in a ransacking manner, two of them searching the basement, two the first floor and two the second floor, demanding all the while that the Petitioner produce keys for locked closet doors they found in the course of their search. At one point Petitioner was unable to readily find the key to her bedroom closet door, in which items allegedly taken in the January 22 burglary ultimately were found. She allegedly told the officers she did not know where the missing key was, but later found the key and gave it to them after the officers threatened to break down the closet door.

When this closet was finally opened and the alleged stolen goods found, Petitioner found herself in her own bedroom, surrounded by a hostile crowd of questioning officers and strangers. After the search had begun, the six officers were joined by one other, and by three civilian strangers called to the home by the searchers. Alone in her bedroom with this group, Petitioner was interrogated at length. At this time she was alleged to have made an exculpatory statement that a fur coat found in the closet was left at her home by a former roomer, a Barbara Brown, who had left for Florida in December, 1965. The burglary was alleged not to have taken place until January, 1966.

The testimony allowed in evidence at trial about Petitioner's exculpatory statements concerning her initial denial that she had stolen items in her home, that she did not have a key to the closet, and that the coat was left there prior to the burglary, were stressed by the Prosecu-

tor in his opening statement and again in his final arguments in an effort to show Petitioner's guilty knowledge.

The search and interrogation lasted approximately two hours. Mrs. Forsythe was then taken to the Lima Police headquarters where she was "booked" for concealing stolen property and then held overnight in the city jail.

The Petitioner first raised the federal question of the denial of her privilege against self-incrimination prior to her trial when, on July 8, 1966, she filed a written motion with the trial court (The Court of Common Pleas of Allen County, Ohio):

> "* * * for an order to suppress any and all evidence against her that might be in the form of written or oral statements made by the defendant immediately before, at the time of, and following her arrest on this charge, for the reason that her constitutional rights were violated in that:
>
> 1. She was not informed of her right to remain silent.
> 2. She was not told that anything she might say could be used against her in court.
> 3. She was not told that she had a right to have an attorney with her before any questioning.
> 4. She was not told that if she wanted an attorney but could not afford one, an attorney would be provided for her free.
> 5. She was not given the opportunity to knowingly and intelligently choose to make or not to make a statement."

On July 18, 1966, the day before Petitioner's trial commenced, trial Judge John H. Davison, following a hearing on Petitioner's motion, held that "any statements and answers to questions of officers given by defendant after being taken in custody on the charge *at the close of*

the search are not admissible in evidence. Statements and answers given before being taken into custody on this charge during search conducted by warrant in investigating a former burglary are admissible * * *." (Emphasis added.)

After trial commenced July 19, 1966, Petitioner again raised the question of infringement of her constitutional privilege against self-incrimination by orally moving to suppress, following the Prosecutor's opening statement, all statements obtained from her during the search. This motion was made in conjunction with Petitioner's motion for a directed verdict based on the inadequacy of the Prosecutor's opening statement. The motions, arguments and court findings are set out in pages 143 to 154 of the Bill of Exceptions. In summary, the Court overruled Petitioner's motion and permitted the Prosecutor to amend his opening statement.

From that point forward in the trial Petitioner objected repeatedly to testimony by State's witness Winters as to statements obtained from her during the search—and was repeatedly overruled.

Ohio's Revised Code, Section 2933.24, following the common law, strictly limits night searches to occasions of "urgent necessity." In pertinent part, the statute reads:

> "* * * the command of the warrant shall be that the search be made in the daytime, unless there is urgent necessity for a search at night in which case a search in the night may be ordered * * *."

Petitioner, however, was unaware that the warrant was illegal and the search unlawful until the Prosecuting Attorney first produced the evidence during the course of the trial.

Petitioner first raised this federal question by means of a general objection when the State sought to introduce

into evidence the items found in her home by the officers. Her objection was overruled and the items admitted, after argument off the record. The gist of the argument by the Prosecutor and the ruling by the Court was, however, that under Ohio's procedural rules the Petitioner had waived her right to have illegally-seized evidence suppressed by failing to make a motion to suppress prior to trial. (Bill of Exceptions, pages 192-93.)

After this, the State's second and final witness, Deputy Winters, took the stand and the following colloquies with Petitioner's counsel, Mr. DaPore, brought out the facts rendering the warrant invalid and the search unreasonable:

> "Q. You first found out something about this case —when was the first time you found out anything about this case?
>
> A. February 20." (Bill of Exceptions, page 222.)

* * * * *

> "Q. What other information did you have in your possession from June (sic) 20 until the night of February 21?
>
> A. I don't quite understand your question. Pertaining to what?
>
> Q. Pertaining to these items that we are talking about here. What additional information did you gather that you didn't get from Nancy Kitchens?
>
> A. That is the only information we had, just what the Kitchens girl told us." (Bill of Exceptions, page 223.)

* * * * *

> "Q. You went out to the Judge's residence. Was there any reason you couldn't have gone to the Judge's residence on the afternoon of the 20th when you found this information out or gone to the Court?
>
> A. I can't recall. I am sorry.

Q. Well, certainly there must have been some logical explanation for getting a Judge out of the privacy of his home at night when you found out the information a day and a half earlier in the afternoon.

A. Well, I can recall that we were very busy at that time.

Q. It was a little inconvenient for you to go out in the afternoon, is that right?

A. No, sir. We had other investigations we were working on at the present time.

Q. But, you weren't worried about the coat or the sweaters disappearing that day and a half from June Forsythe's residence? It wasn't an emergency search was it, if you waited a day and a half?

A. No, sir.

Q. And you went out there at night time instead of day time, is that right?

A. Yes, sir." (Bill of Exceptions, pages 223-24.)

Petitioner then raised the question by motion in the following manner, after she rested without testifying or offering evidence in her behalf:

"The Court: Defendant having rested their case, there is no rebuttal. Are you ready for argument, gentlemen?

Mr. DaPore: (Counsel for Petitioner): We have a preliminary motion that I think can be taken care of at the bench. By reason of all the evidence we would like to make a motion for a directed verdict after all the evidence has been presented and we would like to make a motion to suppress all evidence of oral statements and physical evidence obtained by a search warrant and renew the previous motion.

The Court: Overruled. Now gentlemen, are you ready for argument?" (Bill of Exceptions, pages 255-56.)

In their arguments to the jury, Petitioner's counsel called the jury's attention to the State's failure to call the

other officers who took part in the search, or the persons who informed the police that Petitioner allegedly concealed stolen goods, or the man then in prison who allegedly sold the stolen valuables to the Petitioner, or the woman Petitioner is alleged to have said left the fur coat at her home.

This prompted the Prosecutor in his final argument to comment to the jury on Petitioner's failure to call these witnesses on her behalf, clearly implying to a jury of laymen that if they could have helped her they would have been called by Petitioner and that since they were not called then logically they must have been such as would have harmed her. Thus, the Prosecutor shifted the burden of proof to the Petitioner to prove her innocence.

Examples of these comments are the following by the Prosecutor:

> "Now, unless Mr. DaPore is suggesting that there is some reason not to believe Deputy Winters, then I don't see any reason why we should bring in everyone else that participated in the search. We have the fellow who was there where it happened. Now, if you folks see a reason for that, then I am not aware of that and again all I can do is fall back on my original statement that he could have brought them in just as easily as I could have with the same subpoena." (Bill of Exceptions, pages 306-07.)

and:

> "Now, I would believe in Santa Clause (sic) long before I would believe something like that. Mr. DaPore or Mrs. Evans (counsel for Petitioner) could have called in anyone of these witnesses, but there is no way in the world that the Prosecutor could have ever brought in Barbara Brown, if there is or ever was a Barbara Brown. The only people that could have produced her in this case are counsel for the defendant, and the defendant himself, if there is such a person." (Bill of Exceptions, pages 309-10.)

Petitioner was found guilty by the jury on July 20, 1966. A motion for a new trial, made August 18, 1966, was overruled by the trial court.

Petitioner next raised the federal questions of the violations of her privilege against self-incrimination and unreasonable search and seizure in her unsuccessful appeals to the Allen County Court of Appeals of the Third Judicial District of Ohio and in the Ohio Supreme Court. In these appellate courts the Petitioner also raised the federal question of the violation of her privilege against self-incrimination by the Prosecutor's improper remarks to the jury concerning her failure to call any witnesses on her behalf.

The Assignments of Error to the Court of Appeals were in the following form:

> "1. The court permitted the State of Ohio to present to the jury evidence that was illegally seized from the home of the defendant.
>
> 2. The court permitted the State of Ohio to present testimony by the arresting officer of statements made by the defendant while she was in custody and before she was warned of her constitutional right to remain silent, or her right to counsel.
>
> 3. The prosecuting attorney committed acts of misconduct during his argument prejudicial to the defendant's constitutional rights by commenting upon the defendant's failure to put upon the stand witnesses that were equally available to both the State and the defendant."

The Questions of Law presented to the Ohio Supreme Court were in the following form:

First Question of Law:

> "Whether the questioning of the defendant during the course of a search involving eight law enforcement officers at night when defendant was alone, constituted a deprivation 'of her freedom of action in any

significant way,' requiring the exercise of the procedural safeguards as established by the Miranda decision?"

Second Question of Law:

"Was the admission of items obtained in an illegal search and seizure prejudicial to the rights of the accused where a motion to suppress was not made prior to trial but was made during the trial when the defendant first learned that the search was illegal? Is a pre-trial motion to suppress illegally obtained evidence always necessary?"

Third Question of Law:

"Did the prosecuting attorney prejudice the accused's right of presumption of innocence and shift the burden of proof by commenting in his final argument to the jury upon the defendant's failure to produce witnesses to prove her innocence?"

The Court of Appeals affirmed the conviction without opinion on February 24, 1967, although noting in its journal entry that reasonable grounds existed for the appeal.

The Ohio Supreme Court by a four to three vote on September 27, 1967, dismissed Petitioner's appeal without opinion on the grounds that no substantial constitutional question exists, issued its mandate and dismissed her motion for leave to appeal. Petitioner's motion for rehearing was denied by the Ohio Supreme Court without opinion on October 25, 1967.

Petitioner filed her Notice of Appeal to the United States Supreme Court with the Ohio Supreme Court on January 12, 1968. On November 19, 1967, this Court, by Mr. Justice Potter Stewart, granted Petitioner stay of execution pending her timely filing of this petition for writ of certiorari.

WHY WRIT SHOULD BE GRANTED.

Three clear-cut factual situations are presented in Petitioner's case. If reviewed by this Court, they could serve to clarify the scope of this Court's previous ruling in the area of self-incrimination and resolve the still-prevalent misapprehension by state courts and police that somehow form and procedure is an adequate substitute for the substance of those basic rights accruing to the individual via the 14th Amendment.

> Can a state court permit illegally-seized evidence to be used against a defendant simply because the defendant did not know until too late that the evidence was tainted?
>
> Can six or seven police officers, merely by questioning a suspect in her home and delaying their "arrest" until they have elicited incriminating statements, evade the "in custody" deadline for admonishment laid down by this court in its decision in *Miranda vs. Arizona,* 384 U. S. 436?
>
> If a defendant is protected from prejudicial comment about his failure to testify at trial, should he not also be protected against comment upon his failure to have others testify for him?

The Fourth Amendment safeguard against unreasonable search and seizure is applicable to the States by the 14th Amendment. *Mapp vs. Ohio,* 367 U. S. 643, *Ker vs. California,* 374 U. S. 23, and the standards of unreasonableness are the same under the Fourth and 14th Amendments, *Aguilar vs. Texas,* 378 U. S. 108, *Ker vs. California, supra.* This Court in *Sgro vs. United States,* 287 U. S. 206, characterized the search warrant as a drastic proceeding and said legislation regulating it should be liberally construed in favor of the individual. In *Johnson vs. United States,* 333 U. S. 10, this Court held that even though the searching officers smelled opium through the suspect's

door and had ample probable cause to suspect a felony was being committed, their search without warrant was illegal because they had been told by a reliable informant of the crime an hour beforehand and had ample time to get a warrant.

> "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to the magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement." *Johnson vs. United States, supra.*

The situation in Petitioner's case is that of officers who had their probable cause on February 20, but for their convenience—and presumably for the psychological advantage it would give them over her—they waited until the following night before getting a warrant authorizing a night-time search. This, Petitioner contends, was even more reprehensible than the actions of the police in *Johnson,* and it rendered any evidence they obtained by this illegal warrant subject to suppression.

The knowledge of the delay in seeking the warrant, however, was in the sole possession of the searchers until after trial commenced. At that point the Petitioner, attempting to exercise the exclusionary rule provided her by *Mapp,* ran afoul of the Ohio procedural rule that, as interpreted by the trial court, she had waived her right to suppress the tainted evidence by failing to make a pretrial motion. *Ciano vs. State,* 105 O. S. 229, 137 N. E. 11.

Such procedural defaults in federal courts do not deprive the defendant of his constitutional safeguards. *Amos vs. United States,* 255 U. S. 313, *Gouled vs. United States,* 225 U. S. 298. But in *Henry vs. Mississippi,* 379 U. S. 443, this Court held that a litigant's procedural defaults in a

state court do not prevent vindication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate interest. In the *Henry* case this Court, by vacating judgment in favor of a hearing to determine if the defendant knowingly waived his federal claim by not making timely objection, did not come to grips with the issue of primacy of substantive federal rights over state procedural rights, which it could do on the factual issue presented here.

It is undisputed in Petitioner's case that she was never warned of her rights to silence and to counsel. The dispute is centered on the point in time and circumstance when she should have been warned—that is, when the officers entered her home, or when they finally took her to the station and formally booked her for the crime.

In *Escobedo vs. Illinois*, 378 U. S. 478, this Court held that the suspect must be admonished at that point when the inquiry ceases to be general and starts to focus on a particular suspect. In *Miranda, supra*, this Court sought to clarify for the police this focus rule by holding that the admonishment must come at that point when the suspect is taken into custody or "otherwise deprived of his freedom in any significant way." Petitioner believes that by qualifying the "in custody" requirement with a broad statement concerning any significant deprivation of a suspect's freedom of action, this Court meant to warn police that they cannot circumvent the *Escobedo* rule by artful dodges and semantics; that the suspect need not be in handcuffs, or in a police station, or even a police car to be "in custody"; that invading a lone woman's house in force, subjecting her to the coercion of fear and apprehension such as a visit of raid proportions carries with it, and mutely warning her by their presence that she cannot leave but must stay in her own home and answer their

persistent questions, may not be "in custody" as police view it, but is certainly a significant deprivation of freedom that brings her within the procedural safeguards of the Fifth, Sixth and 14th Amendments.

The third factual issue presented here is the comment by the prosecutor upon Petitioner's failure to present witnesses in her behalf. This Court, in *Griffin vs. California,* 380 U. S. 609, held that the Fifth Amendment, as it bears on the States by reason of the 14th Amendment, forbids comment by the prosecution on the accused's silence. This guarantee against being compelled to testify against oneself was characterized in *In Re Gault,* 387 U. S. 1, at page 50, as "* * *—a command which this court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom."

Comment upon a defendant's failure to testify amounts to a tender of evidence of his failure to deny the accusation and creates a presumption of guilt which casts the burden of proof upon the defendant. As this Court said in *Griffin,* page 614, it penalizes the accused for asserting the privilege.

Petitioner contends that the same sort of comment by the Prosecutor to the jury, only this time aimed at the accused's failure to have others testify for him, renders the prohibition of *Griffin* meaningless by solemnizing the accused's failure to come forward with proof into evidence against him as surely as does comment upon his failure to speak out for himself.

For these reasons Petitioner urges that the writ be granted.

Respectfully submitted,

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APPENDIX A.

Orders in the Supreme of Ohio.

No. 40914.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Plaintiff-Appellee,
vs.
PAULINE JUNE FORSYTHE,
Defendant-Appellant.

ORDER ON MOTION FOR LEAVE TO APPEAL.

(Entered September 27, 1967.)

It is ordered by the Court that this motion is overruled.

MANDATE.

(Entered September 27, 1967.)

To the Honorable Common Pleas Court within and for the County of Allen, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Dismissed, sua sponte, no substantial constitutional question involved.

Order on Rehearing.

(Entered October 25, 1967.)

It is ordered by the court that rehearing in this case is denied.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE.

On January 22, 1966, the residence of Mr. and Mrs. A. D. Aebker at 1429 Shawnee Road, Lima, Ohio, was burglarized. A number of items of personal property were stolen in the course of the burglary including a full length mink coat, a cashmere sweater with mink collar and a cashmere sweater with fox collar, all of which were the property of Elizabeth Aebker. Although an immediate investigation of the burglary was initiated by the Allen County Sheriff's Department no significant leads were developed until the afternoon of February 20, 1966, at which time information was received from a source previously proven reliable that the three (3) stolen articles above referred to had been sold by one James Tarter to June Forsythe and had been observed at the latter's residence at 224 East McKibben Street, Lima, Ohio. The following day an affidavit for a warrant authorizing a search of

the premises at 224 East McKibben Street, Lima, Ohio, was presented to Judge Roger Andrews of the Lima Municipal Court and that court ordered a search warrant issued. The testimony at the trial indicated that the affidavit was presented to Judge Andrews at approximately 6:30 P.M. on February 21, 1966 and that the warrant was executed at approximately 8:15 P.M. that same date. The residence located at 224 East McKibben Street was a large two-story dwelling containing some nine (9) rooms and a total of four (4) entrances or exits. Six officers including four (4) deputy sheriffs and two (2) officers from the Lima Police Department were present at the time the warrant was served. The officers were admitted to the home of the defendant by the defendant personally and the warrant was read to her and served upon her at that time. Deputy John Winters of the Allen County Sheriff's Department was in charge of the search and was the officer who served the warrant. After the warrant was read to the defendant she stated that she didn't know any James Tarter and that she didn't have any fur coats. (R. 202.) Deputy Winters replied: "Mrs. Forsythe, if you do have the coats, we would like to have them." (R. 202.) He then further explained to her "that they were taken in a burglary and that they had information that they were sold to her." He then re-iterated that if she had the coats they would like to have them and that if she did not give them up it would be necessary to search the house. Mrs. Forsythe again stated that she didn't have anything and that she didn't know any James Tarter. The officers then dispersed throughout the residence and commenced a search for the articles in question. During the period covered by the search the defendant moved freely about her home completely unrestricted in her movements by any officer. It should be added at this point

that when the officers arrived at the defendant's residence with the search warrant an adult male person was present, identified by the defendant only as "a friend" who remained on the premises during the entire period covered by the search. She was, therefore, never alone during this period as claimed in her petition herein. (See R. 226, 227.) Shortly after the commencement of the search it was discovered that a closet in the front bedroom on the first floor was locked. The defendant was asked if she had the key to this closet and she replied that the key had been lost. She was then advised that if the key was not located it would be necessary to remove the door forcibly and she then stated she would try to find the key. Sometime later the defendant produced a key that fit the closet. The closet was opened and found to contain, among other things, one (1) full length mink coat, one (1) three-quarter length mink coat or stole, two (2) short mink capes or stoles and one (1) three-quarter length mink cape or stole. Two of the coats had had the labels removed. When the coats were first removed from the closet the defendant was asked to whom they belonged, and she replied that they were hers. The coats were then laid out on a bed and individually shown to her and she identified each as being hers except for the full length mink coat (State's Exhibit A). This was said to have belonged to a girl that had come to her home as a roomer some five (5) months previously. At this point Deputy Winters returned to the closet and removed a cashmere sweater with a mink collar. The identifying label had been removed from this sweater. Deputy Winters asked the defendant if this sweater was hers and she stated that it was. This sweater was placed on the bed beneath the full length mink coat and out of view. Mr. and Mrs. Aebker were then contacted at their home and asked to come to the defendant's home

to see if they could identify any of the articles that had been recovered from the closet. When they arrived, Mrs. Aebker immediately identified the full length mink coat as being hers. She was then asked if anything else had been missing from her home and she replied that two (2) sweaters were missing. Deputy Winters then asked her to describe the sweaters and when she described a beige cashmere with a mink collar he lifted the full length mink and revealed the sweater beneath which she immediately identified as her own. Deputy Winters then asked Mrs. Aebker to describe the other sweater and after she had done so he went to the closet and removed a gray cashmere with a fox collar and jewelry attached which matched the description given and which she also readily identified as her own.

A third party, a Miss Heiman, was summoned to the residence at 224 East McKibben to see if she could identify certain of the other furs found at that address but she had no connection with the identification of the property of Mrs. Aebker and in fact, merely identified one of the other furs as being the property of the defendant. This person is affiliated with a local establishment which is involved in the sale and storage and cleaning of furs.

Upon completion of the search and the recovery of the three items of property belonging to Mrs. Aebker, the defendant was taken into custody and transported to the Allen County Jail where she was questioned and subsequently incarcerated. The April term of the Allen County Grand Jury returned an indictment against the defendant for the offense of concealing stolen property under Section 2907.30 of the Ohio Revised Code upon which these proceedings were had.

Prior to the trial the defense filed a motion to suppress "any and all evidence against her that might be in

the form of written or oral statements made by the defendant immediately before, at the time of, and following her arrest on this charge," for the reason that she was not properly warned of her constitutional rights as required by the decision in the case of *Miranda vs. State of Arizona.* A second motion was filed requesting that the defense be allowed to view all physical evidence in the hands of the Prosecuting Attorney. The latter motion was granted without argument. The former motion was granted as to all statements made following the time that the defendant was taken into custody after the search of her home but allowing all statements and answers given prior to being taken into custody and during the search: *at no time prior to trial was any motion filed on behalf of the defendant to suppress any physical evidence.*

This case proceeded to trial by jury on July 19, 1966 and a verdict of guilty in the manner and form charged in the indictment was returned on July 20, 1966, with the value of the property concealed being fixed at $1,000.00.

A motion for new trial was filed on behalf of the defendant on July 21, 1966 and upon the same being overruled by the trial court the statutory penalty was imposed and this appeal taken.

ARGUMENT.

In presenting our argument on behalf of the Respondent we will consider the questions presented by the Petitioner in the same sequence in which they appear on page 2 of her Brief filed herein.

I.

"Whether a state procedural rule that a defendant waives her privilege against the use of illegally seized evidence if she does not move to suppress said evidence prior to her trial can operate to deny her of her constitutional safeguards against the use of illegally seized evidence is a situation where the knowledge that the evidence was illegally seized was not available to the defendant until after her trial commenced?"

The evidence referred to here by the Petitioner consists of the mink coat, cashmere sweater with mink collar and the cashmere sweater with fox collar which were admitted in evidence at the time of trial as State's Exhibits A, B and C respectively. The procedural rule referred to is that pronounced by the Supreme Court of Ohio in the case of *State v. Davis* (1 Ohio St. (2d) 28; 30 O. O. (2d) 16, 1964) and which is as follows:

> "Where there has been an illegal search and seizure of evidence tending to incriminate an accused and such accused and his counsel know about such search and seizure in ample time to prepare and file a pretrial motion to suppress such evidence, a failure to do so will amount to a waiver by the accused of his right to object to admission of that evidence against him."

The articles in question were found in a locked closet in the bedroom of the Petitioner at her home at 224 E. McKibben Street, Lima, Ohio, during a search conducted on the evening of February 21, 1966 by members of the

Allen County, Ohio Sheriff's Department and the Lima Police Department. The search was made under the authority of a search warrant issued by Judge Roger D. Andrews of the Lima Municipal Court at approximately 6:30 P. M. the same date. No motion was made prior to trial to suppress these or any other items of *physical* evidence although written motions were made on behalf of Petitioner, in advance of trial, to suppress oral statements made by her during the search of her home and to require the Prosecuting Attorney to exhibit to the Petitioner and her attorneys all physical evidence then in his possession which he intended to introduce as evidence at the trial in this case. (A. 1, 2.) These two (2) motions were filed on July 8, 1966 and eleven (11) days prior to the commencement of the trial of this case. The motions came on for hearing on the 18th day of July, 1966 and one (1) day prior to the trial and a full hearing was held at which the Petitioner testified at length concerning the search conducted at her home on the night of February 21st and Deputy Sheriff John Winters testified on behalf of the State concerning the same subject matter. As to the motion to suppress oral statements made by the Petitioner the Court overruled the same as it applied to any statements made by the Petitioner during the search but sustained the motion as to all statements made following the time that she was arrested and taken into custody. The second motion was acquiesced in by the State, and Petitioner and her attorneys were afforded the full opportunity to view the three articles in question in advance of the trial.

When the exhibits in question were offered in evidence at the trial the defense objected to their admission on the ground that they were "illegally obtained." (R. 192.) No objection was offered by the defense to the identification of these exhibits by the State's first witness,

Mrs. Aebker, in the presence of the jury (R. 171-177) and to the similar testimony of Deputy Winters following the overruling of the objection. (R. 215, 216, 220.) Counsel for the Petitioner based their argument on the fact that the State had failed to make an affirmative showing of the "urgent necessity" for conducting the search during the nighttime and that the warrant thereby became invalid and the evidence seized thereunder inadmissible. Following the objection by the defense to the admission into evidence of State's Exhibits A, B and C, the following colloquy occurred between counsel which clearly establishes that counsel for defendant had full knowledge at that time of the grounds for their objection:

> "Mr. DaPore: We will enter an objection to these.
>
> The Court: What is the basis of the objection?
>
> Mr. DaPore: On the basis of them being illegally obtained, which will come out later in the trial.
>
> Mr. Balyeat: If that is the basis of the objection, perhaps we had better argue it at this time.
>
> Mr. DaPore: I think it will come out with the other evidence.
>
> Mr. Balyeat: I think that we should argue this right now.
>
> Mr. DaPore: Fine." (R. 192.)

Following this exchange between counsel and the Court the jury was dismissed and the objection to the admissibility of the articles was argued by counsel. It is significant that Petitioner did not order the transcript of the argument had on this objection or the hearing had on her pre-trial motion to suppress. It is also significant that the affidavit for the search warrant and the warrant issued thereupon were not offered in evidence at the trial or at any other stage of these proceedings. We suggest that the reason that this Court, and the reviewing courts below, were not afforded the opportunity to review the testimony

and argument at the hearing on the motion to suppress and upon the objection referred to was that it would conclusively establish that counsel for the defendant had, indeed, had to have had, full knowledge of the contents of the affidavit for the search warrant, the warrant itself and the details surrounding the search itself. The defense did not and has not raised any question regarding the proper return of the search warrant as required by the law of Ohio and in the absence of some showing that the warrant was not returned to the issuing Magistrate within a reasonable time it must be assumed that such was accomplished in conformity to law. Thus, the attorneys for the Petitioner had several months in which to examine and re-examine the affidavit and search warrant and to review with their client the circumstances surrounding the search itself. Additionally, they had the benefit of the testimony given by their client and that of Deputy Winters at the hearing on their motion to suppress the oral statements made by the Petitioner during the search, as well as the opportunity to view prior to trial the physical objects obtained during the search. In the face of this they now argue that the rule of the *Davis* case is not applicable to the present case because "the knowledge that the evidence was illegally seized was not available to the defendant until after her trial commenced." (Question I, *supra.*) Actually, the procedural requirement stated in the *Davis* case does not require that an accused or his counsel have specific knowledge of facts which would render the search unreasonable or illegal but at the most would require that such accused or his counsel have reasonable grounds to assume that the search was unreasonable. To conclude otherwise would require this Court and every reviewing Court to determine in each case the factual question of whether the accused or counsel had actual knowledge of

facts and circumstances clearly establishing the illegality of the search.

It is interesting to note that Petitioner claims in her brief that the objection entered by her counsel at the time State's Exhibits A, B and C were offered in evidence was a general objection only. (pages 7 and 8 of petitioner's brief.) The following language then appears: "Her objection was overruled and the items admitted, after argument off the record." (Petitioner's Brief, page 8.) First, the argument was, of course, not off the record. It simply was not transcribed by the court reporter because it is the practice of reporters in this jurisdiction not to transcribe the argument of counsel on objections taken during the trial unless requested to do so by the party ordering the bill of exceptions. Secondly, it is inconceivable that counsel would now claim that their objection went only to the competency, relevancy and materiality of the evidence offered where that evidence consisted of the three items that were alleged in the indictment to have been unlawfully concealed by the Petitioner and where counsel stated at the time of making such objection that the ground was the evidence being illegally obtained. (R. 192.)

It is the contention of the Respondent that it would be difficult to imagine a set of facts more on all fours with the holding of the court in the *Davis* case than the one before us. Since the Petitioner is not now and did not previously in her initial appeal to the Court of Appeals contest the propriety or validity of the procedural rule enunciated in the *Davis* case but only contends that the rule does not apply to the facts in this case we have not deemed it necessary or even appropriate here to discuss the rationale of that decision. Some confusion may have been generated as to the Petitioner's position regarding that rule by reason of the variation in the language used

by her in her Assignments of Error to the Court of Appeals and the Question of Law presented to the Ohio Supreme Court. The assignment of error to the Court of Appeals on the question we have been discussing was as follows:

> "The Court permitted the State of Ohio to present to the jury evidence that was illegally seized from the home of the defendant." (Petitioner's Brief, page 11.)

The Question of Law presented to the Supreme Court arising from the same point read:

> "Was the admission of items obtained in an illegal search and seizure prejudicial to the rights of the accused where a motion to suppress was not made prior to trial but was made during the trial when the defendant first learned that the search was illegal? *Is a pre-trial motion to suppress illegally obtained evidence always necessary?*" (Emphasis supplied.)

The confusion arising from the variation in language set forth above is further enlarged by the argument of counsel for Petitioner at pages 14 and 15 of their brief where they speak of running afoul of the Ohio procedural rule and claiming that "Such procedural defaults in federal courts do not deprive the defendant of his constitutional safeguards." Although this language may suggest that the Petitioner is now attacking the merits of the Ohio procedural rule referred to, we wish to point out that at no time was any such argument presented to the Court of Appeals upon the review of this case. The following language appeared in the Reply Brief of the Petitioner (Defendant-Appellant) filed in that court in reply to the argument of the State on the point now before us:

> "The State argues that because the defendant failed to object by pre-trial motion to the admission of evidence seized in an illegal search, her objection during trial to the admission of the evidence violated

a procedural rule and thereby she waived a basic constitutional right to have such evidence suppressed. The State's argument ignores, or indicates a misunderstanding of, the thrust of defendant's argument.

Appellant does not dispute the rule laid down in *State v. Davis*, 30 O. O. 2 16. She simply contends it does not apply in her case, and is not intended to. The Davis rule applies to those situations where the actions of the searchers render the search patently unreasonable and illegal, and hence effectively warn a defendant and his counsel, before trial, that the evidence seized should be suppressed. In such situations a defendant and his counsel have the opportunity to move prior to trial for the suppression of the evidence, thus saving for subsequent appeal this claim of a basic constitutional right should the motion to suppress be overruled."

The Respondent has stated its belief that the procedural rule stated by the Supreme Court in the case of *State v. Davis* is particularly applicable to the present case. We would point out further in our concluding remarks on this issue that there is another basis for comparison between the two cases which is significant. In his opinion in the *Davis* case Chief Justice Taft pointed out, although perhaps by way of dictum, that the judgment of conviction in that case would stand even if the physical evidence had been suppressed because no objection had been made to the testimony of the witnesses who identified the stolen articles of clothing involved in that case. "In this case no objection was made to the testimony of the witnesses with respect to the suits. In view of the very completeness of that testimony and the unobjected showing of the exhibits to the jury on repeated occasions and the lack of any defense by the defendant, the mere acceptance of the exhibits into evidence at the close of the case could

not, in our opinion, have affected the result." (Chief Justice Taft quoting from opinion of Court of Appeals in case of *State v. Dvais, supra.*) Thus the Chief Justice concluded that there was no "reasonable possibility that the mere admission of the suits in evidence," which is all that was objected to by Petitioner and her counsel, "might have contributed to the conviction," applying the test established by this Court in *Fahy v. Connecticut,* 375 U. S. 85, 11 L. Ed. (2d) 171, 84 S. Ct. 299. Certainly the same reasoning and conclusion would appear applicable to the present case where the State's first witness, Mrs. Aebker, testified at length in identifying the three exhibits in the presence of the jury and without objection. (R. 171-177.) When the second and only other witness, John Winters, was called by the state he further identified the same exhibits on direct examination without objection and in the presence of the jury. (R. 215, 216, 220.) On cross-examination counsel for Petitioner once again asked Deputy Winters to identify the exhibits which were at that time also in full view of the jury. (R. 243.)

II.

"Whether a woman alone in her home except for seven police officers who have accused her of a crime and are questioning her while searching her home, has been deprived of her freedom in a significant way so as to bring her within the procedural safeguards of the constitution of the United States as to statements obtained from her by the officers?"

It will be noted that we have set forth in this Brief our separate and independent "Statement of the Case." We have done so for two reasons. First, it appears that the Petitioner has combined argument with its own Statement of the Case, and secondly, there is a notable dispar-

ity between many of the facts as set forth in Petitioner's Statement and those which actually occurred in connection with these proceedings.

The second paragraph under Petitioner's Statement of the Case recites that the Petitioner was home *alone* in her home at 224 E. McKibben Street in Lima, Ohio, the night of February 21, 1966 when six police officers armed with an *illegal* search warrant entered the home, and *after accusing her of concealing stolen property,* conducted a *vigorous and ransacking* nighttime search of her home. (Petitioner's Brief, pp. 3, 4—emphasis supplied.) The Petitioner was not alone in her home at or during the time of the search. The transcript of the testimony of Deputy Winters on cross examination clearly established that a male companion was present during the entire period covered by the search. (R. 226, 277.)

The "fact" that the officers were armed with an *illegal* search warrant is of course not fact at all but simply the claim of the Petitioner which has been discussed at length elsewhere in this Brief. If there is any substantiation in the record of the statement that the police accused the Petitioner at the time referred to of concealing stolen property it has escaped our attention. In the same manner, the words used to describe the search had to have been drawn from some source other than the testimony and evidence presented in this case.

In the next succeeding paragraph the Petitioner is referred to as a "distraught woman." There is no evidence in the case that would support such an observation. The only adjectives used to describe the manner or appearance of the Petitioner at the time of the search was that she was polite and cooperative (R. 225) and nervous. (R. 236.) The connotation normally associated with a person who is cooperative and polite during a search of her

home by law enforcement officials is not particularly that of a distraught individual and we submit that it is impossible to determine whether her nervousness was attributable to the presence of the officers or their presence coupled with her guilty knowledge that within her bedroom closet hung the articles which were the primary subject of the search.

The Petitioner continually throughout her Statement of the Case and argument attempts to create the illusion of one lone female surrounded by six oversized police officers who are levelling questions at her in a demanding tone and rapid fire manner. This is pure illusion and nothing more. We have already pointed out that she had with her in her home a male companion who remained there during the entire period of the search. It is also uncontradicted that of the six officers who participated in the search three of them, Deputy Koontz, Deputy Daley and Detective Saunders, were searching the upstairs of the home while Deputy Winters and Detective Wetzel primarily searched the first or main floor of the home. (R. 240, 242.) During the same period of time some of the officers were searching the basement of the home. It is abundantly clear from the testimony of Deputy Winters that the officers separated into groups to conduct the search and that the Petitioner freely moved about the home during this entire time. Particular attention is drawn to the following questions asked by defense counsel of Deputy Winters on cross-examination and the latter's answers thereto:

"By Mr. DaPore:

Q. Well, you went in all different directions to search this place, is that right?

A. Yes.

Q. And you were asking for keys and upstairs

they were asking for keys, and there were boys in the basement. What were they doing downstairs there?

A. Searching the basement.

Q. Well, was this sort of upsetting to Mrs. Forsythe while the six of you were going in various directions searching her home?

A. She was nervous.

Q. Well, you didn't take Mrs. Forsythe along with you while you made this search of her home, did you?

A. No, sir.

Q. Is there any reason why you couldn't have done this in a proper—or would you think it would have been proper fashion to have searched the home with her present one room at a time and given due regard to her personal items?

A. No, sir." (R. 236.)

We submit that Petitioner's claim that she was under the domination of the officers and "had been deprived of her freedom in a significant way" would be more acceptable if the search had been conducted in the manner suggested by Petitioner's counsel, that is, if all six officers had accompanied the Petitioner from room to room during the search.

We believe it appropriate at this time to discuss briefly the inference drawn by Petitioner throughout her Brief that an excessive number of officers participated in the search of the house in question. We have already established that there were six officers who participated in the search. One additional officer arrived after the search had been completed. (R. 239, 240.) It was established that the home of Petitioner consisted of some nine rooms and that it had four different entrances or exits. (R. 196.) If we are to accept the remarks of Petitioner's counsel in opening statement the residence was being used as a room-

ing house. What is the correct number of officers that should undertake the execution of a search of a nine room house having four different exits and containing an unknown number of occupants? Certainly one or two would appear to be an inadequate number and three or four not unreasonable. We know too from normal experience that where one department, such as the Sheriff's Department in this case, carries its investigation into the incorporated area it is considered normal courtesy to invite members of the local police department to participate in that phase of the investigation. Thus, we submit, there was nothing unusual in the fact that the search party in the present case was composed of four members of the Sheriff's Department which was in charge of the investigation of the burglary of the Aebker residence located in the county and two members of the Lima Police Department. But then it will undoubtedly be suggested that the question is not whether the number of officers dispatched upon the search was excessive but, rather, whether the mere presence of six officers in the home of the Petitioner during the time that certain questions incidental to the search were put to her would require the determination that such constituted custodial interrogation without the requisite admonishment required by the rule established in *Escobedo v. Illinois*, 378 U. S. 478, and further clarified by the decision of this Court in *Miranda v. Arizona*, 384 U. S. 436.

We have no quarrel with the rule announced by this Court in the *Escobedo* case or in the cases which were the basis for the decision in *Miranda v. Arizona*. We do, however, claim the right of total disagreement with Petitioner's application of the rule laid down in those cases to the facts in the present case. It is essential that we keep in mind that in most cases where a search is conducted with a war-

rant the object of the search is something which relates to a crime that has already been committed. In many instances the person in control of the premises to be searched has, or is believed to have, no other connection with the commission of such offense. To phrase the matter differently the usual objective of the search is the location of physical objects rather than persons suspected of crime. In the present case the investigation which led to the search of the Forsythe residence was related to an unsolved burglary which she was not suspected to have committed yet the Petitioner claims that at the moment the officers arrived at her home on February 21, 1966, the investigation had focused upon her to the extent that the officers should have been required to advise her of her rights prior to executing the search warrant then in their possession. Since the defendant was obviously not under arrest or in police custody at this time, it is necessary to invoke the rule of *Miranda* that it be established that the defendant was deprived of her freedom in some significant way. We contend that there is no showing from the evidence that the Petitioner's freedom was in any way limited beyond the fact that a warrant to search the premises at 224 E. McKibben Street in Lima was served upon her. There is absolutely no showing of any physical restraint imposed upon the Petitioner at or during any time covered by the search. She not only was completely free to move about her home but she did in fact do just that. If she could move freely from room to room without supervision by any of the officers present then why couldn't she have left the house via any of the four exits available? It is apparently the contention of the Petitioner that the number of officers present in a person's home during a search is determination of whether that person is deprived of her freedom in a significant way. How can such a standard

be adopted or applied with any degree of logic or fairness? What constitutes the magic number of officers whose presence would produce such a result? If six officers present with a woman *alone* in her home would per se constitute a substantial limitation of her freedom then how many officers would be required to be present when she had an adult male companion present with her at the time of the search? Are we to assume that all persons will react to the same extent and in the same manner to the presence of police officers in their home? Or is it more consistent with human experience to accept the premise that the disposition and reaction of such individuals is a never constant variable? We have no doubt that there are many persons who might react with trepidation to the presence of a single officer at their home with a search warrant. We have also known and observed persons who could and would react with complete complacency in the presence of a dozen officers. The safest rule it seems to us is to leave such determination to the trial court who had the opportunity to view and hear the witnesses who attended the search, including the person in whose custody and control lay the place to be searched, except where the evidence clearly warrants doing otherwise.

The record in this case is completely void of any remarks by Deputy Winters or any other officer which might have been construed as intimidating or coercive. To the contrary, the remarks of Deputy Winters as they appear in the transcript are, we believe, indicative that the officer behaved with complete courtesy and asked only those questions ordinarily deemed necessary in executing a search warrant.

A thorough examination of the decision in the *Miranda* case clearly points up that the holding of the court in that case is directed to the situation where the tech-

niques employed in interrogation of a suspect are conducted in a hostile atmosphere. The majority opinion of the court is replete with references to incommunicado interrogation where a suspect is shut off from the outside world and subjected to lengthy interrogation by the prosecutor or teams of police officers. The entire rationale suggested as the basis for the court's holding in that case is in complete contradiction to the situation in the present case where the Petitioner was in her own home, had a male friend present with her, was obviously free to move about in any way she desired and was subjected to no formal interrogation whatever but was asked the minimum of questions ordinarily essential to execute a search warrant.

To apply the rule of *Miranda* to the case at hand would, we believe, impose an unrealistic limitation on general investigation technique essential to law enforcement in a setting where the constitutional rights of the individual are rarely jeopardized.

III.

The third and final question presented by Petitioner in her Brief is as follows:

"Whether the procedural safeguards of the Constitution of the United States extend to protect a defendant who has declined to testify at her trial against remarks by the prosecutor to the jury about the defendant's failure to call any witnesses to her defense?"

The counsel for the Petitioner devoted the substantial portion of their closing arguments to the jury to attacking the prosecutor for the failure to call additional witnesses in support of its case. Mrs. Rizor and Mr. DaPore criticized the prosecutor for failing to call James

Tarter, an inmate of the Ohio Penitentiary, to elicit from him a judicial confession that he had committed the burglary of the Aebker residence. (R. 284, 290, 291.) The State in its final argument and by way of *rebuttal* to the remarks of defense counsel, pointed out the rarity of obtaining confessions from convicts for offenses with which they have never been charged and further replied to the statements of defense counsel that they could have called him if they desired him to be present. (R. 299, 300.)

Counsel for defense also, in their arguments, criticized the State for not calling Nancy Kitchens, the girl who had furnished the information which led to the search warrant. (R. 284, 289, 290.) The State replied to this criticism by pointing out that first, it was established that she was now a patient in a state hospital, and secondly, that there was no need to argue her creditability at this point since her information had been proven reliable to the extent that the stolen property had been recovered from the precise place where Nancy Kitchens had said it would be. (R. 300.) The defense even suggested that if Nancy Kitchens was too ill to testify that we should have produced a doctor to testify to this fact. (R. 290.)

The defense counsel charged in their argument that the State should have called *all* of the police officers who participated in the search as well as the officer who arrived after the search had been completed. (R. 286.) The State replied to this charge by pointing out that the only two officers whose search produced any results were officers Winters and Wetzel. The other officers searched other parts of the house and found nothing. There is not the slightest indication that they could have offered any testimony either favorable or unfavorable to the accused other than testimony which was entirely of a cumulative nature. Again, the State pointed out that if for some

reason the repetitious testimony of the other six policemen was desired the defense could have called them as witnesses.

The important factors regarding the comments made by the State in its final argument with regard to the witnesses referred to above are:

> (1) That such comments were by way of answer or reply to statements made by the defense.

and

> (2) That the State did not in any true sense criticize the defense for failing to call those witnesses but rather offered its own explanation as to why it had not called them and pointed out that the defense could have produced them had they seen fit to do so.

Certainly it must be conceded that there is a world of difference between the State's voluntary comments upon the failure of the defense to produce witnesses or testimony to rebut the State's case and the State's exercising the right of reply to charges that it had failed to produce witnesses *favorable to the State's case* coupled with the suggestion that the defense had the right to compel the attendance of the same witnesses. We are unable to comprehend how by any manner of reasoning this could be considered a violation of the defendant's right against self incrimination. At no time did the Prosecuting Attorney suggest that the defense *should* have called the other police officers or Nancy Kitchens or James Tarter. To the contrary we stated our opinion that nothing would have been accomplished by doing so. How then can the defense now argue that our purpose was to infer that these witnesses were not called because their testimony would have been unfavorable to the Petitioner?

We do readily concede that the comments made with regard to "Barbara Brown" fall within a different category. It has always been the rule in this jurisdiction that if a witness is not available to the state and whose testimony, if called, would be favorable to the accused is not called the failure to do so is a proper subject for comment by the prosecution. 15 *O. Jur.* 2d, Criminal Law 540. We believe this rule to be a sound one and not inconsistent with the principle laid down in the case of *Griffin vs. California,* 380 U. S. 609. It has long been considered highly improper in the State of Ohio for the prosecuting attorney to make an attack upon the defendant's case because he did not call a particular witness where the witness was available for the State and probably would have testified to that which would have convicted the defendant. *Abrams v. State,* 34 O. App. 13, 170 N. E. 188. The essential ingredients of this theory however are the *availability* of the witness to the state and the likelihood that his testimony would be *damaging* to the accused. Neither ingredient was present in the instant case. As far as the state was concerned Barbara Brown was a name only with no past, present or future. She could not have been more unavailable as a witness if she were dead. Her testimony, if she could have been produced and would have been believed, would have clearly required the defendant's acquittal. How then can it logically or fairly be maintained that to comment upon the failure of the defense to produce her was tantamount to compelling the defendant-Petitioner to incriminate herself?

SUMMARY OF ARGUMENT.

QUESTION No. 1.

Was the procedural rule adopted by the State of Ohio relative to the timely filing of a motion to suppress properly applied in the instant case?

In the present case the Petitioner obviously was aware of the search as of the moment the warrant was read to her. Although not included in the transcript of testimony ordered by the Petitioner in this case it was brought out at a pre-trial hearing that the Petitioner called and talked with one of her attorneys from the Allen County Jail the same night on which the search occurred. A period of almost six months ensued between the search and the trial of the case and it must be presumed since no evidence has been offered to the contrary that the warrant was properly returned and together with the affidavit was available for inspection by Petitioner and her counsel at any time. Pre-trial motions to suppress oral statements made by the Petitioner during the search and to examine the articles taken in the search were filed on behalf of the Petitioner. A full hearing on the motion to suppress was had on the day prior to the trial and the same Deputy Winters testified then that testified at the trial and still no motion to suppress the physical evidence was presented to the Court. The transcript of this hearing was not ordered by Petitioner as part of the Bill of Exceptions in this case for the obvious reason that such would conclusively establish that the Petitioner and her counsel were fully aware of the basis for the search warrant, the contents of both the affidavit and the warrant and the details surrounding the search. The Petitioner has not questioned the propriety of the procedural rule referred to here but has simply claimed that it does not apply to her case. The Petitioner's interpretation of the procedural

rule adopted by this state and referred to herein would require a reviewing court to determine in each case the factual question of whether the knowledge that the evidence was illegally seized was available to the defendant or her counsel prior to the trial.

QUESTION No. 2.

Did the presence of six police officers in the home of the Petitioner during the time that certain questions incidental to the search were put to her constitute custodial interrogation so as to require the admonishment set forth by the Miranda Decision?

A male companion of the Petitioner was present with her at her home when the officers arrived with a search warrant and he remained there during the entire period covered by the search. The Petitioner was free to move about her home without interference by any of the officers present and she did in fact do just that. The home which was the basis of the search consisted of a nine room two-story dwelling with four exits or entrances and was reputedly used as a rooming house at the time of the search. The officers split up in various directions to search various parts of the home without interfering with the Petitioner's freedom of movement. A no time was any physical restraint imposed upon the Petitioner. Any questions put to the Petitioner during the course of the search were of the type necessarily incidental to a search. A full hearing was held prior to the trial of this case on the motion filed by Petitioner to suppress oral statements made by the Petitioner during and following the search. At the hearing the Petitioner and the officer in charge of the search testified at length and were cross-examined in close detail. The Court to which this evidence was presented concluded that the Petitioner was not in custody and that her free-

dom had not been limited in any significant way and therefore overruled the motion as it applied to statements made during the search. The Court did find, however, that subsequent to the identification of the stolen articles by Mr. and Mrs. Aebker, the owners, the Petitioner was arrested and placed in custody and ordered suppressed the statements made by her subsequent to that time. The Petitioner did not order a transcript of the hearing had on the motion to suppress and the evidence adduced thereat is not included in the record of these proceedings.

QUESTION No. 3.

Were the constitutional rights of the Petitioner violated by comments made by the Prosecuting Attorney in his final argument to the Jury?

With the exception of the comments made regarding the failure of the defense to produce Barbara Brown these comments were in reply to statements made by defense counsel in their preceding argument in which they sharply criticized the Prosecution for not calling the other police officers who participated in the search, the Kitchens girl who was a patient in a state hospital and James Tarter who was an inmate at the Ohio Penitentiary. These comments by the Prosecuting Attorney were not by way of criticism toward the defense for not calling these witnesses but to the contrary were offered to explain why the State had not deemed it necessary to call them *and* to point out that the defense could have produced them had they seen fit to do so. At no time did the prosecution suggest that the defense *should* have produced these witnesses.

Barbara Brown constituted a witness who was not available to the state and whose testimony would have been extremely favorable to the accused had she been summoned and testified in support of the claims of the

Petitioner. We concede that it is improper for the prosecution to attack the defendant's case because that defendant failed to call a witness *available to the state and whose testimony would have helped convict such defendant* but neither of these ingredients were present in the instant case.

For the reasons outlined above, the Respondent contends that the writ should be denied.

Respectfully submitted,

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